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THE RIO GRANDE IRRIGATION AND COLONIZATION COMPANY, APPELLANT,

vs.

CHARLES H. GILDERSLEEVE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED MARCH 7, [illegible]

(16,813.)

(16,813.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 254.

THE RIO GRANDE IRRIGATION AND COLONIZATION COMPANY, APPELLANT,

vs.

CHARLES H. GILDERSLEEVE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 18, 1899.

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a No. 643.

Be it remembered that on the 19th day of June, A. D. 1896, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record; which said transcript is in the words and figures following, to wit:

b In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1896.

RIO GRANDE IRRIGATION AND COLONIZATION Company *vs.* CHARLES H. GILDERSLEEVE.	No. 643. Error to Bernalillo County.

Transcript of Record.

F. W. Clancy, attorney for plaintiff in error.
Warren, Fergusson & Gillett, attorneys for defendants in error.

1 Be it remembered that heretofore, to wit: on the 20th day of September, A. D. 1895, there was lodged in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, a writ of error from the supreme court of the Territory of New Mexico, which said writ of error is in the words and figures following, that is to say:

The Territory of New Mexico to the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of judgment in a certain cause lately pending before you, wherein Charles H. Gildersleeve was plaintiff and Rio Grande Irrigation and Colonization Company was defendant, error has intervened, as it is said, to the damage of the said defendant, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment therein be given, that then, under your seal distinctly and openly, you send a copy of the record and proceedings aforesaid, to the supreme court
2 of the Territory of Mew Mexico, together with this writ, so that you have the same in the said supreme court on the first day of the next term thereof, to be begun and held on the last Monday of July, A. D. 1896, at Santa Fé, in said Territory, in pursuance of law.

Witness the Honorable Thomas Smith, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court, this 13th day of September, A. D. 1895.

[SEAL.] GEO. L. WYLLYS, *Clerk.*

And in obedience to the command contained in the said writ of error I herewith transmit to the supreme court of the Territory of New Mexico a transcript of the record of said cause.

Be it remembered that heretofore, to wit: on the 17th day of July, 1894, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a declaration in a plea of assumpsit, which said declaration is in the words and figures following, that is to say:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court of the Second Judicial District.

In the District Court of the Second Judicial District of the
3 Territory of New Mexico, Sitting within and for the County of Bernalillo for the trial of Causes Arising under the Laws of said Territory.

Charles H. Gildersleeve, a resident of the county of Santa Fé, and Territory of New Mexico, complains of the Rio Grande Irrigation and Colonization Company, a corporation organized and existing under the laws of the Territory of New Mexico and the principal place of business whereof is located in the city of Albuquerque, county of Bernalillo, and Territory of New Mexico, in an action of assumpsit.

For that whereas the said defendant, heretofore, to wit: on the thirtieth day of June, A. D. 1890, at Santa Fé, N. M., that is to say at the county of Bernalillo aforesaid made a certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit: the day and year aforesaid, and thereby then and there promised to pay, at the Maverick National Bank of Boston, Massachusetts, sixty days after the date of the date thereof, to one P. R. Smith or order, the sum of fifty thousand seven hundred and sixty dollars ($50,760) with interest from the date thereof at the rate of twelve per cent. per annum until paid, and reasonable cost of collection, including plaintiff's attorney's fees, if not paid when due; for value received, and then and there delivered the said promissory note to the said P. R. Smith; and the said P. R. Smith to whom or to whose order the payment of the said sum of money in the said promissory note specified, was to be made, after the making
4 of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid at the county of Bernalillo and Territory of New Mexico aforesaid, endorsed the said promissory note, by which said endorsement the said P. R. Smith then and there ordered and appointed the said sum of money in the said promissory note specified, to be paid to the said Charles H. Gildersleeve by the name and description of C. H. Gildersleeve, the said plaintiff, and there delivered the said promissory note so endorsed aforesaid, to the said plaintiff. And the said plaintiff avers, that afterward, and when the said note became due and payable, according to the tenor and effect thereof, to wit, on the said thirtieth day of August, in the year aforesaid, at the said Maverick national bank, to wit, in the county of Bernalillo

and Territory of New Mexico aforesaid, the said promissory note was duly presented and shown for payment thereof and payment of the said sum of money therein specified was then and there duly required, according to the tenor and effect of the said promissory note, but that neither the said Maverick national bank nor the said defendant, nor any other person or persons on behalf of the said defendant, did or would at the time when the said promissory note was so presented and shown for payment thereof as aforesaid, or at any other time before or afterward, pay the said sum of money therein specified or any part thereof, but wholly neglected and refused so to do, of all which several premises the said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Bernalillo aforesaid, had notice by means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, when the said defendant should be thereunto afterward requested, and being so liable, the said defendant, in consideration thereof, afterwards to wit, on the day and year last aforesaid, at the county of Bernalillo aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory note specified, when the said defendant should be thereunto afterwards requested, a copy of which said note is herewith filed and made a part of this declaration.

And whereas also afterwards to wit, on the day and year last aforesaid, at the county of Bernalillo aforesaid, the said defendant was indebted to the said plaintiff in the further sum of five hundred dollars ($500.00) for the work and labor, care, diligence and attendance of the said plaintiff by the said plaintiff before that time done, performed and bestowed, as the attorney of and for the said defendant, in and about the advice, counsel, and business for the said plaintiff in respect thereof, and also for divers journeys and other attendances by the said plaintiff before then made, performed and given in and about said business, and for the said defendant and at the special instance and request of the said defendant and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county of Bernalillo aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the last-mentioned sum of money, when the said defendant should be thereunto afterwards requested.

And whereas also afterwards, to wit, on the day and year last aforesaid, at the county of Bernalillo aforesaid, the defendant was indebted to the said plaintiff in the further sum of seven hundred and fifty dollars ($750.00) of like lawful money for so much money by the said plaintiff before that time paid, laid out and expended to and for the use of said defendant at the like special instance and request of the said defendant. And being so indebted the said defendant, in consideration thereof, afterwards to wit, on the day and year last aforesaid, undertook and then and there faithfully prom-

ised the said plaintiff to pay him the last-mentioned sum of money, when the said defendant should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the day and year last aforesaid, at the county of Bernalillo aforesaid, was indebted to the said plaintiff in the further sum of eighty thousand dollars ($80,000) for goods, wares and merchandise before that time sold and delivered by the plaintiff to the defendant at the request of the said defendant, and in the sum of eighty thousand
(80,000) dollars for money before that time paid and laid out
7 and expended by the plaintiff for the use and at the request of the defendant, and in the sum of eighty thousand dollars ($80,000) for so much money before that time lent and accommodated by the plaintiff to and at the request of the said defendant; and in the sum of eighty thousand dollars ($80,000) for so much money before that time had and received by the defendant to the use of the plaintiff; and in the sum of eighty thousand dollars ($80,000) for work, labor and service before that time done, performed and bestowed, by the plaintiff for and at the request of said defendant; and in the sum of eighty thousand dollars ($80,000) for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and in the sum of eighty thousand dollars ($80,000) for so much money before that time due from the defendant to the plaintiff for interest upon and for the forbearance of divers large sums of money, before then due from the defendant to the plaintiff and by the plaintiff foreborne to the defendant for long spaces of time before then elapsed at the request of the said defendant.

Nevertheless the said defendant not regarding the said several promises and undertakings hath not as yet the said several sums of money paid, or any or either of them or any part thereof to the said plaintiff, although often requested so to do; but the said defendant to pay him the same hath hitherto wholly neglected and refused
and still doth neglect and refuse.

8 To the damage of the said plaintiff in the sum of eighty thousand dollars ($80,000), and therefore he brings his suit and asks judgment for the said sum of eighty thousand dollars ($80,000) together with interest and costs of suit.

WARREN, FERGUSSON & BRUNER,
C. H. GILDERSLEEVE,
Attorneys for Plaintiff.

And thereupon, on the same day, to wit, the 17th day of July, A. D. 1894, there was duly issued out of the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a summons in the said cause, which said summons is in the words and figures following, that is to say:

The Territory of New Mexico to the sheriff of Bernalillo county, Greeting:

You are hereby commanded to summon the Rio Grande Irriga-t-on and Colonization Company to be and appear before the district

court for the county of Bernalillo, in the second judicial district of the Territory of New Mexico, on the first return day occurring not less than twenty days after service hereof, if the defendant served is a resident of said judicial district, or on the first return day occurring not less than thirty days after service hereof, if the defendant served is not a resident of said judicial district, then and there
9 to answer unto Charles H. Gildersleeve in a plea of assumpsit to the damage of said plaintiff eighty thousand dollars, together with interest and costs of suit, the first Monday in each month being a return day, and each defendant being required to enter his appearance in the office of the clerk of said court on or before the return day on which this writ is returnable, or judgment by default may be rendered against him and have you then and there this writ.

Witness the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, and the seal of said district court this 17th day of July, A. D. 1894.

[SEAL.]

O. N. MARRON,
Clerk of said District Court.

Which said summons was endorsed as follows, to wit:

This is a suit in assumpsit brought to recover the amounts due from defendant to plaintiff upon a certain promissory note made by defendant, The Rio Grande Irrigation and Colonization Company for $50,760, dated June 30th, 1890, payable sixty days after date to P. R. Smith or order and by him endorsed to plaintiff, with interest at twelve per cent. per annum from date until paid, and for money lent, for money paid, for money received, for interest and upon an account stated and for attorneys' fees.

Damages claimed $80,000, together with interest and costs.

O. N. MARRON, *Clerk.*

10 Which said summons was thereafter and on, to wit, the 23rd day of July returned to and filed in the office of the clerk of the district court of said second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, with the sheriff's return thereto attached, which said sheriff's return is in the words and figures following, that is to say:

I hereby certify that after diligent search and inquiry I could not find the president of the within defendant corporation in my county that I served the same in my county where the principal office of said corporation is kept and its principal business carried on by delivering a true copy thereof to J. Francisco Chaves, he being a director and stockholder of said defendant corporation, at the county of Bernalillo, Territory of New Mexico, on the 17th day of July, A. D. 1894.

JACOBO YRISARRI, *Sheriff*,
By T. S. HUBBELL,
Deputy Sheriff.

And thereafter and on, to wit, the 17th day of July, A. D. 1894, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a copy of the promissory note of the said defendant, which said copy of the promissory note is in the words and figures following, to wit:

11 Second national bank.

$50,760. SANTA FÉ, N. M., *June* 30, 1890.

Sixty days after date, we, jointly and severally promise to pay to the order of P. R. Smith, fifty thousand seven hundred and sixty dollars with interest after date at the rate of twelve per cent. per annum until paid, and reasonable costs of collection, including plaintiff's attorneys' fees if not paid when due. Value received.

Payable at Maverick national bank, Boston.

RIO GRANDE IRRIGATION AND
COLONIZATION COMPANY,
By HORACE D. HALL, *President.*

Countersigned:
RIO GRANDE IRRIGATION &
COLONIZATION COMPANY,
By A. L. RICHARDSON,
Assistant Treasurer.

[Seal of the Company.]

(Endorsed:) Pay to the order of the Second National Bank of New Mexico at Santa Fé. P. R. Smith, C. H. Gildersleeve. Pay to the order of J. H. Work, Cr., for collection, on account of Second National Bank of New Mexico, at Santa Fé. W. G. Simmons, cashier. W. G. Simmons.

12 Office of A. L. Richardson, sec't'y of the Rio Grande Irrigation & Colonization Co., No. 1 Beacon St., room 81.

BOSTON, *June* 30, 1890.

At a meeting of the directors of the Rio Grande Irrigation and Colonization Company held at the office of the secretary on June 10, 1890, the following preamble and resolution was passed.

Whereas the Second National Bank of New Mexico (Santa Fé) holds the note of this company for the amount of forty-seven thousand ($47,000) dollars bearing interest at the rate of twelve per cent. per annum and endorsed by P. R. Smith and C. H. Gildersleeve, which note was due April 30, 1890.

Now therefore it is voted

That the president and assistant treasurer are hereby authorized to execute in the name and behalf of the company this company's note payable to said Second National Bank of New Mexico in sixty days from the date thereof or in any other reasonable time not exceeding ninety days, that said bank may agree to for the amount of principal and interest due on said outstanding note said new note

to bear interest at said rate of twelve per cent. per annum and the said officers are hereby authorized to use such new note when endorsed by said Smith and Gildersleeve or otherwise in taking
13 up or procuring an extension of this company's outstanding note held by said bank as aforesaid.

A true copy.

[Seal of the Company.]

Attest: A. L. RICHARDSON, *Secretary.*

L. Vernon Briggs, notary public, U. S. Passports.

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, City of Boston, }

On this 30th day of August in the year of our Lord one thousand eight hundred and ninety, I, L. B. Briggs notary public, duly commissioned and sworn in and for the county of Suffolk and practicing in the city of Boston, at the request of the cashier of the Maverick National Bank of Boston, went with the original note which is hereto annexed, the time therein limited and grace having fully elapsed to the Maverick national bank and demanding payment was answered by the teller "no funds."

The note remaining unpaid, I duly and officially notified the last endorser, of said dishonor, by written notice sent him per mail to Santa Fé, New Mexico, including the notices of each of the other parties thereto.

(Postage prepaid.) In said notices requiring payment.

Wherefore, I, the said notary, by request, as aforesaid, have protested, and by these presents do solemnly protest against the drawer of said note and all others concerned therein for exchange, re-
14 exchange, and all costs, charges, damages, and interest, suffered and sustained, or to be suffered and sustained by reason or in consequence of non-payment thereof.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

Noting non-acceptance.

Postage, travel and expense.

Fees protesting for non-payment.....	$2.00
Postage, travel and expense,.....	02
	$2.02

L. VERNON BRIGGS,
Notary Public.

And thereafter and on, to wit: the third day of August, A. D. 1894, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, the appearance of the said defendant, which said appearance is in the words and figures following, that is to say:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court of the Second Judicial — of the Territory of New Mexico, Sitting in and for the County of Bernalillo for the Trial of Causes Arising under the Laws of said Territory.

CHAS. H. GILDERSLEEVE }
vs.
THE RIO GRANDE IRRIGATION & COLONIZATION CO. }

Now comes the defendant by H. L. Pickett its attorney and
15 enters its appearance in the above-entitled cause.

H. L. PICKETT,
Att'y for Defendant.

And thereafter and on the 15th day of September, 1894, there was filed in the office of the clerk of the said court for the said second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a withdrawal of the appearance of the said defendant, which said withdrawal is in the words and figures following, to wit:

H. L. Pickett, attorney-at-law.

SILVER CITY, NEW MEXICO, *Sept. 7th*, 1894.

Messrs. Warren & Fergusson, attorneys-at-law, Albuquerque, N. M.

GENTLEMEN: Some time since I filed an appearance in the case of Gildersleeve *vs.* some Co. I don't now remember the exact name, of which Col. P. R. Smith is the agent, and at his request I withdraw the appearance. You can show this letter to the clerk of the court and have the appearance withdrawn and take your judgment.

Yours truly, H. L. PICKETT.

16 And thereafter, on, to wit, the 15th day of September, A. D. 1894, there was duly issued by the clerk of the said court and filed in the office of the said clerk a certificate of non-appearance of the said defendant in the said cause, which said certificate is in the words and figures following, that is to say:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

CHARLES H. GILDERSLEEVE }
vs. } No. 3922.
RIO GRANDE IRRIGATION & COLONIZATION CO. }

I, O. N. Marron, clerk of said court, do hereby certify that a declaration in assumpsit in the above-entitled cause was filed in my office on, to wit, the 17th day of July, A. D. 1894, and that process returnable to a return day occurring not less than twenty days after service was thereupon issued. I further certify that service

was had upon the defendant company on the said 17th day of July, 1894, by delivering a true copy of the writ at the principal place of business of said corporation by delivering the said copy to J. Francisco Chavez, a director and stockholder in the said corporation, all of which appears by the return of the sheriff on said writ. I further certify that no appearance of the said defendant is entered in my said office.

17 In witness whereof I have hereunto set my hand and affixed the seal of said court this 15th day of September, 1894.

[COURT SEAL.] O. N. MARRON, *Clerk.*

And thereupon, on the same day, to wit, the 15th day of September, A. D. 1894, there was made and entered of record in the said cause a judgment of the court in vacation which said judgment is in the words and figures following, to wit:

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY. } No. 3922. Assumpsit.

Upon reading and filing the certificate of the clerk of this court that although the said defendant was on, to wit, the 17th day of July, A. D. 1894, personally served with process in this cause returnable to a return day, occurring not less than twenty days after service if the defendant served is a resident of the judicial district, the said defendant has not entered or caused to be entered for it an appearance in his said office.

It is therefore considered and adjudged by the court that the said plaintiff ought to have and recover from the said defendant his damages by reason of the premises, and this action being for a money demand, and the amount of the judgment to be entered herein being a mere matter of computation.

18 It is ordered that the clerk ascertain said amount, and thereupon said amount is ascertained and reported to be seventy-six thousand three hundred ninety-three dollars and eighty cents.

It is therefore considered and adjudged by the court that the said plaintiff, Charles H. Gildersleeve, recover of said defendant, Rio Grande Irrigation and Colonization Company, the amount of his damages assessed as aforesaid, together with the costs in this behalf expended to be taxed and that he have execution therefor.

It is further ordered that this judgment bear interest at the rate of twelve per cent. per annum, that being the rate expressed in the promissory note on which this action is based.

And thereafter and on, to wit, the 5th day of October, 1894, there was issued out of the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, an execution in the said cause, which said execution is in the words and figures following, to wit:

The Territory of New Mexico to the sheriff of Bernalillo county, Greeting:

You are hereby commanded that of the goods and chattels, lands and tenements of Rio Grande Irrigation and Colonization Company in your county, you cause to be made the sum of seventy-six
19 thousand three hundred ninety-three and $\frac{80}{100}$ dollars and damages and ten $\frac{00}{100}$ dollars cost of suit which by the judgment of our district court within and for the county of Bernalillo, and Territory aforesaid, on September 10th, A. D. 1894, Charles H. Gildersleeve recovered against the said Rio Grande Irrigation and Colonization Company with interest thereon from the 10th day of September, A. D. 1894, until paid at the rate of twelve per cent. per annum and also the costs that may accrue and due return make of your proceedings, on this writ before our said district court within sixty days from the receipt hereof to render, etc. and have you then and there this writ.

Witness the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, and the seal of the said district court this 5th day of October, A. D. 1894.

[COURT SEAL.] O. N. MARRON, *Clerk.*

Which said execution was afterwards and on, to wit, the 26th day of October, A. D. 1894, returned to and filed in the office of the clerk of said court with the sheriff's return thereto attached, which said sheriff's return is in the words and figures following, to wit:

No property found in my county owned by or belonging to defendants.

J. YRISARRI, *Sheriff.*

20 And thereafter and on, to wit, the 15th day of November, A. D. 1894, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a motion of the defendant to set aside the judgment in said cause, which said motion is in the words and figures following, that is to say:

In the District Court, Bernalillo County, October Term, 1894.

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY.

Now comes the said defendant by its attorney, F. W. Clancy, and moves the court to vacate and set aside the judgment heretofore entered in this cause for the following reasons:

1. Said judgment was taken against this defendant for want of an appearance when the record shows that it had duly and regularly entered its appearance.

2. No copy of the declaration was ever served upon defendant

notwithstanding the fact that its appearance had been regularly entered.

3. This defendant was in no way or manner in default at the time said judgment was entered as will appear by an inspection of the record.

F. W. CLANCY,
Attorney for Defendant.

21 And thereafter and on, to wit, the 6th day of September, A. D. 1895, there was duly made and entered of record in the said cause and order of the court in vacation, which said order is in the words and figures following, that is to say:

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY. } No. 3922. Assumpsit.

At this day this cause is heard upon the defendant's motion to set aside and vacate the judgment heretofore entered herein, and the court, after hearing the arguments of F. W. Clancy, Esq., attorney for the said defendant, and of H. L. Warren, Esq., for the said plaintiff in opposition to said motion, and being now fully advised in the premises.

It is ordered and adjudged that the said motion be and it is hereby overruled.

And thereafter on the same day, to wit, the 9th day of September, 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, the proposed pleas of the said defendant in the said cause, which said pleas are in the words and figures following, that is to say:

In the District Court, Territory of New Mexico, County of Bernalillo.

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY. }

22 Now comes the said defendant by its attorney, F. W. Clancy, and defends the wrong and injury when and where it shall behoove it and whatsoever else it ought to defend, and says that plaintiff ought not to have and maintain his aforesaid action against it, because it says that it did not undertake or promise in manner and form as plaintiff hath thereof complained against it and of this it puts itself upon the country.

F. W. CLANCY,
Attorney for Defendant.

And the plaintiff doth the like.

_____,
Attorney for Plaintiff.

And for a further plea in this behalf by leave of the court, first had and obtained, defendant says *actio non*, because it says that the promissory note referred to in said declaration a copy whereof is filed with said declaration, is not the genuine and duly executed note of this defendant and that this defendant never authorized or ratified the execution of the said note and that the persons whose names are signed thereto were not authorized by this defendant to execute the said note in the name of the defendant, nor has their action in executing said note ever been ratified by this defendant; and this defendant is ready to verify; wherefore it prays judgment of the action aforesaid of plaintiff and whether plaintiff ought to have or maintain his said action against it.

23 And for a further plea in this behalf, by leave of the court first had and obtained, defendant says *actio non*, because it says that the said promissory note referred to in said declaration, a copy of which is filed with said declaration was and is in truth and in fact the promissory note of the said plaintiff, made and executed for his use and benefit, and in no manner for the use or benefit of this defendant; and if the said note had been duly authorized and executed by defendant, defendant would be only an accommodation maker for the use and benefit of plaintiff; and this defendant is ready to verify; wherefore it prays judgment of the action aforesaid of plaintiff and whether plaintiff ought to have and maintain his said action against it.

F. W. CLANCY,
Attorney for Defendant.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

F. W. Clancy being duly sworn on his oath says that he is the attorney and agent of the Rio Grande Irrigation and Colonization Company and that the foregoing pleas are true to the best of his knowledge, information and belief.

F. W. CLANCY.

Subscribed and sworn to before me on this 7th day of September, 1895.

[NOTARY SEAL.] HARRY F. LEE,
Notary Public.

24 And thereafter and on, to wit, the 12th day of September, 1891, there was duly made and entered of record in the said cause an order of the court in vacation, which said order of the court is in the words and figures following, to wit:

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY. } No. 3922. Assumpsit.

At this day this cause is heard upon the defendant's motion to vacate and set aside the judgment heretofore entered herein for the reasons stated in the motion on file, and the court after hearing

the arguments of counsel as well for the said plaintiff as for the defendant and being fully advised.

It is ordered and adjudged by the court that the said motion be and it is hereby overruled.

And thereafter and on, to wit, the seventh day of December, A. D. 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, a bill of exceptions of the said defendant in the said above-entitled cause, which said bill of exceptions is in the words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

25 CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY.

Be it remembered, that after the appearance of the defendant in the above-entitled cause had been duly and regularly entered therein by H. L. Pickett its attorney of record no application was ever made to the said court or to the judge thereof for leave to withdraw the said appearance and no order was ever made by said court or said judge giving leave that such an appearance might be withdrawn, except as may otherwise by the record appear, if anything does so appear, but on the 16th day of September, 1895, a paper signed by said Pickett, defendant's attorney, was filed by plaintiff in said cause, which paper was in words following to wit:

H. L. Pickett, attorney-at-law.

SILVER CITY, NEW MEXICO, *Sept. 7th*, 1894.

Messrs. Warren & Fergusson, attorneys-at-law, Albuquerque, N. M.

GENTLEMEN: Some time since I filed an appearance in the case of Gildersleeve *vs.* some Co. I don't now remember the exact name, of which Col. P. R. Smith is the agent, and at his request I
26 withdraw the appearance. You can show this letter to the clerk of the court and have the appearance withdrawn and take your judgment.

Yours truly, H. L. PICKETT.

And afterwards, to wit, on the 15th day of November, A. D. 1894, and during the next succeeding term of said court, after the said judgment had been entered in vacation the said defendant filed in the office of the clerk of said court its motion to vacate and set aside the judgment theretofore entered in said cause for reasons set forth in said motion, which said motion was and is in words and figures following, to wit:

In the District Court, Bernalillo County, October Term, 1894.

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY.

Now comes the said defendant by its attorney, F. W. Clancy, and moves the court to vacate and set aside the judgment heretofore entered in this cause for the following reasons:

1. Said judgment was taken against this defendant for want of an appearance when the record shows that it had duly and regularly entered its appearance.

27 2. No copy of the declaration was ever served upon defendant notwithstanding the fact that its appearance had been regularly entered.

3. This defendant was in no way or manner in default at the time said judgment was entered as will appear by inspection of the record.

F. W. CLANCY,
Attorney for Defendant.

And the said motion coming on to be heard before the judge of said court on the 6th of September, 1895, and having been argued by counsel as well for the said plaintiff as for defendant, the court denied said motion, to which action of the court in denying the said motion and refusing to vacate and set aside said judgment, the defendant then and there excepted and still doth except.

And afterwards, to wit, on the 9th day of September, 1895, the said defendant filed in the office of the clerk of said court its motion to vacate and set aside the judgment aforesaid for reasons set forth in an accompanying affidavit filed therewith and also filed at the same time its proposed pleas verified by oath, which said motion, affidavit and proposed pleas were and are in the words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY.

28 Now comes the said defendant, by its attorney, and moves the court to set aside the judgment heretofore rendered in this cause for reasons set forth in the accompanying affidavit of F. W. Clancy filed herewith and in accordance with the rule of this court produces and files herewith its proposed pleas verified by oath and offers to submit to such terms as the court may deem just.

F. W. CLANCY,
Attorney for Defendant.

The attorneys for plaintiff are hereby notified that defendant will call up the above motion for action before the judge of this court,

at the court-house in Bernalillo county, on Thursday the 12th of September, 1895, at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard.

F. W. CLANCY,
Attorney for Defendant.

Received copy of the above motion and notice together with accompanying affidavit and pleas this 7th day of September, 1895.

H. L. WARREN & GILLETT,
Attorney- for Plaintiff.

In the District Court, County of Bernalillo, Territory of New Mexico.

CHARLES H. GILDERSLEEVE,
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY.

TERRITORY OF NEW MEXICO,
County of Bernalillo.

Frank W. Clancy, being duly sworn, deposes and says that he is the regular attorney for said company and has been ever since the 7th day of November, 1894; that as such attorney he has had occasion to inform himself concerning the principal matter in litigation in the above-entitled cause and that as the result of his inquiries and investigation he states the facts to be as follows:

At a meeting of the directors of said company held at Boston on the 9th day of July, 1889, the following preamble and vote were adopted:

"Whereas, it has been determined by this company to issue $3,000,000 in first-mortgage, five per cent. bonds, payable in twenty years and to secure the payment of the same and interest thereon by a deed of trust covering all the property and franchise of the company to be made by the president and secretary of the company to the American Loan and Trust Company as trustee, and,

Whereas, persons living in the Rio Grande valley and elsewhere in New Mexico, being anxious to aid and encourage the construction of lines of ditches, canals, reservoirs, and pipe lines of the character proposed and contemplated to be caused to be constructed by this company for that purpose have evidenced their willingness to convey and cause to be conveyed to S. Endicott Peabody of —— as trustee for the use and benefit of the bondholders of this company and such other purposes as he may declare, each alternate section or subdivision of vacant arid lands lying in the Rio Grande valley belonging to them, aggregating in area about one million acres of land, and,

30 Whereas, as further and better security for the payment of the bonds so voted to be issued by this company; it is intended and understood that there shall be vested in said S. Endicott Peabody as trustee, the title to the following grants of land in New Mexico, viz: the Vallecito grant, 114,400 acres; Ojo del Espirito Santo, 113,141 acres; 170,000 acres out of the Socorro grant, all of

which shall be pledged by said trustee to secure the payment of said bonds and interest payments thereon, and,

Whereas, this company is anxious to purchase the capital stock, property and franchise of the Grant County Pipe Line Real Estate and Cattle Company and of the Membres River Canal Company, corporations organized for the construction of ditches, pipe lines, etc., in Grant county, New Mexico.

Now, therefore, in order to effect the purchase of the stock of the Grant County Pipe Line Real Estate and Cattle Company and the Membres River Canal Company, and in order to enable this company to avail itself of the great and additional security for the payment of its bonds that would result from the acquisition by the trustee of one million acres in the Rio Grande valley and the additional value that would be given said bonds by the acquisition by said trustee of the grants of land above mentioned, be it,

Resolved, That in order to enable C. H. Gildersleeve, who to that end is hereby empowered so to do to purchase the capital stock of said two corporations, and to enable the trustee of the bondholders of this company to avail himself of the title to the lands in the Rio Grande valley and said three grants and to carry out the objects for which his trust is to be created, that there be and hereby is voted to C. H. Gildersleeve the amount of fifty thousand shares of the capital stock of this company and the sum of 1,510,000 in the first-mortgage bonds of this company, and that the president and secretary execute and deliver said stock and bonds to him."

31 On the 31st day of October, 1889, there was held at Santa Fé, New Mexico, a meeting of stockholders of the said company at which according to their record thereof the following stockholders appear to have been present and voted:

H. D. Hall,	by P. R. Smith, proxy.....	200 shares
S. S. Rowe,	" "	200 shares
A. W. Benton,	" "	150 shares
Chas. E. Guild,	" "	200 shares
E. S. True,	" "	20 shares
A. L. Richardson,	" "	100 shares
I. H. Lakin,	" "	1 share
A. C. Hill,	" "	1 share
P. R. Smith, for himself.....		350 shares
L. Spiegelberg.....		50 shares
C. H. Gildersleeve.....		2,500 shares

At the said meeting the following proceedings were had:

Whereas, owing to the failure of some of the directors of this company and subscribers for the stock and bonds heretofore voted Charles H. Gildersleeve, to pay the cash therefor in order to enable him to pay for the Vallecito grant, and it being the desire of the stockholders that the title thereto shall immediately vest in S. Endicott Peabody, trustee, to carry out the objects of the company and give greater value and security for its bonds and said Gildersleeve proposes that in consideration of the assistance of this

company to enable him to raise the sum of $47,000, to make final payment therefore, to deposit as security therefor the sum of one hundred and twenty thousand dollars of the bonds of the company and six hundred shares of the capital stock of the company,
32 it is voted that P. R. Smith, president of the stockholders' meeting sign and execute in the name of the company a promissory note for the sum of forty-seven thousand dollars, payable in six months, to pay for the balance due on said grant, and that unless paid at maturity by the sale of lands deposited as collateral thereto, the treasurer of this company is hereby directed to pay the same out of the treasury.

Meeting adjourned until two o'clock p. m.

On reconvening, (present as before.)

P. R. Smith, president of the stockholders 'meeting reported that he had signed the company's name to a note in favor of the Second National Bank of Santa Fé, for the sum of forty-seven thousand dollars, payable in six months, bearing twelve per cent. interest from date, according to the resolution of the stockholders passed this morning, and that there had been deposited as collateral thereto one hundred and twenty thousand dollars in bonds and six hundred shares of *a* stock.

On the 30th day of October, 1889, the following telegram was sent from Santa Fé, New Mexico, by P. R. Smith one of the stockholders of said company:

SANTA FÉ, *October* 30, 1889.

Hall, Rowe & Richardson, No. 1 Beacon St., Boston:

If you will give your assent for me to sign the company's note for forty-seven thousand, payable six months from date I can now pay ten thousand dollars and get clear title to Peabody to all the property upon which to issue our bonds.

One hundred and twenty thousand of bonds certificates to accompany note as collateral, the Second national bank here agrees to discount the note for the owners. Strongly urge the acceptance
33 of this proposition at once, as it puts us in first-class shape to carry out our scheme as originally contemplated, there will be no personal responsibility as stockholders will give unanimous consent, answer quick.

(Signed) P. R. SMITH.

The said Hall, Rowe and Richardson to whom the foregoing telegram was addressed were at the time directors of said company; but as affiant is informed and believes no answer was sent to the said telegram.

The note executed by Mr. P. R. Smith as stated in the extract from the proceedings of the meeting of October 31, 1889, was as follows:

$47,000. SANTA FÉ, NEW MEXICO, *October* 31*st*, 1889.

Six months after date we jointly and severally, promise to pay to the order of the Second National Bank of New Mexico, at Santa Fé, at the office of said bank, forty-seven thousand dollars with

interest after date, at the rate of twelve per cent. per annum, until paid, and reasonable costs of collection, including plaintiff's attorney fees if not paid when due. Value received.

(Signed) RIO GRANDE IRRIGATION AND COLONIZATION COMPANY,
By P. R. SMITH,
President Stockholders' Meeting.

Endorsed by C. Gildersleeve and P. R. Smith (individually).

Upon the same day upon which the foregoing note was given, the plaintiff in the above-entitled cause made and presented to the stockholders of said company the following report:

34 To the stockholders of the Rio Grande Irrigation and Colonization Company.

At their annual meeting held in Santa Fé, on the 31st day of October, 1889.

GENTLEMEN: On the 9th day of July, 1889, your board of directors voted me 50,000 shares of the capital stock of this company, and one million five hundred and ten thousand of the first-mortgage bonds thereof, and in pursuance of the directions of the board of directors certificates therefor have been issued to me that I have returned to the company for its use seven thousand four hundred and fifty shares of stock and hold the receipt of your assistant treasurer therefor.

That under the provisions of said resolution I was empowered to use said bonds and stock in the purchase of the stock of the Grant County Pipe Line and Real Estate Company, and the Mimbres River Canal Company, and Ojo del Espirito grant, and the Vallecito grant and one hundred and seventy thousand acres of the Socorro grant, and to the contracting and arranging for lands in the Rio Grande valley and of the carrying out of the objects for which the trust of S. Endicott Peabody was originally created.

I have to report that under said power so vested in me under said resolutions I have purchased the Vallecito grant of 114,000 acres of land, and have purchased 186,000 acres of land out of the Socorro and paid for the same, and caused the titles thereto to vest in S. Endicott Peabody, having first submitted the titles thereto to Honorable L. Bradford Prince, governor of New Mexico, who under resolution of the board of date August 1st, 1889, was named and designated as a representative of the company to pass upon said titles, and the same were first approved by him in due form.

I herewith respectfully submit said titles and approval of Governor Prince thereof.

35 I also report that under the power of said resolution I have acquired the capital stock, books, and papers of the Mimbres River Canal Company which is herewith submitted.

I also report that I gave the subject of the purchase of the stock of the Grant County Pipe Line and Real Estate and Cattle Company considerable study and attention. I found on examination

that the lands and property previously belonging to said company and supposed to belong to said company when the vote was passed empowering its purchase by me, had been transferred to trustees and that the acquisition of the capital stock by this company would be valueless. I also found that the Grant County Pipe Line Real Estate and Cattle Company could not effectually carry out all the purposes for which it was incorporated, and that its own representatives regarded its articles of incorporation, as comparatively valueless.

I also ascertained that another corporation in New Mexico claimed prior corporate rights over the same country comprehended in articles of incorporation of the Grant County Company and threatened suit if any work was commenced by this company on the authority of any rights claimed by the Grant County Company. I therefore declined to make said purchase and suggest a resolution by you ratifying my action and discharging me from any further duty or responsibility in connection therewith.

I also report that owing to the failure of the stockholders to provide me the necessary means as per agreement with which to pay for the Ojo del Espirito grant, that I have not purchased the same. I recommend that of the bonds and stock certificates now in my hands there be set apart one hundred and fifty thousand of the bonds, and seventy-five thousand of the stock as a fund for the specific purpose of purchasing said grant as originally contemplated and that my authority to purchase the same with said
36 bonds and stock thereof be continued in full force.

I further report that as the form for the conveyances or contracts for alternate sections along the Rio Grande have not been printed or furnished me by the company I have entered into a contract with —— —— to procure the signing of said contracts or on failure to do so to forfeit the sum of one hundred thousand dollars in the bonds and the stock of the company to be placed in the hands of L. Spiegelberg for that purpose; that said form of contract has been submitted to Governor Prince and approved by him, copies of which are herewith respectfully submitted.

In conclusion permit me to state that I have substantially carried out the purpose and spirit of the resolution voting the bonds and stock to me and empowering me as in said resolution named.

I therefore respectfully request that my acts in the matter be ratified by the stockholders, and that a resolution be passed by you to that effect, and that all the bonds and stock so voted to me (excepting what may be returned by me as a fund created for the purchase of the Espirito Santos grant) be declared to be my property and fully paid for by me, and that I be relieved from any and all further liability or accountability in connection therewith or by reason of said resolution or otherwise.

In conclusion permit me to state that I have been greatly delayed and embarrassed on account of the failure of Boston subscribers to pay for the bonds purchased by them from me to enable me to pay the cash necessary to carry out the objects of the company in New Mexico, and if any loss or delay has occurred it has not

been by reason of any failure on my part to perform my undertaking.

All of which is respectfully submitted.

C. H. GILDERSLEEVE.

October 31st, 1889.

37 Immediately upon the presentation of the said report the following votes were adopted by the said stockholders:

On motion it was voted that the report of C. H. Gildersleeve and his action on the matters therein contained, be and the same is hereby ratified and approved.

It appearing from said report that he has been unable to purchase the Ojo del Espirito Santo grant, not being furnished with sufficient funds wherewith to pay for the same,

Voted that this company has and does hereby accept the same in full discharge and satisfaction of any and all contracts and undertakings heretofore made and existing between this company and said C. H. Gildersleeve that his acts in the premises are hereby declared to be a full and complete performance by him of the resolutions of the board of directors heretofore passed; and that all the bonds and stock of this company heretofore voted and delivered to him (excepting the one hundred and fifty thousand dollar bonds and seven hundred and fifty shares of stock for the purchase of the Ojo del Espirito grant) be and are hereby declared to belong to him; that this company acknowledged full and complete consideration and payment therefor; and he is hereby discharged from any further liability or accountability for the same.

Affiant charges that the understanding and effect of the transactions as set forth in the foregoing extracts and copies was merely to give to the said Gildersleeve the assistance of the said company to enable him to raise the sum of $47,000 which he repre-

38 sented was necesary to make final payment for the Vallecito grant and that the said note for $47,000 then executed and delivered was in truth and in fact the note of the said Gildersleeve and that said company as between it and said Gildersleeve was a mere surety on said note which, if it represented anything, evidenced his indebtedness only, he having undertaken to purchase large amounts of land, including said Vallecito grant, with the stock and bonds of said company, all of which stock and bonds which had been delivered to him for such purposes were retained and kept by him as his own property as appears by his report and the subsequent vote of the stockholders at the said meeting of October 31, 1889, with the exception of $150,000 of bonds and $75,000 of the stock which were to be set aside for the specific purpose of purchasing the Ojo del Espirito Santo grant, and that no portion of the bonds and stock which had been voted to the said Gildersleeve on the 9th of July, 1889, with the exception as above stated was ever returned to or received by the company, and the failure of directors and subscribers for bonds and stock to pay the cash therefor was not a matter for which the said company was in anywise responsible, but was one of the risks incidental to the undertaking which

said Gildersleeve assumed under the vote to him of stock and bonds of July 9, 1889, and was a matter between him and them individually.

On the 10th day of June, 1890, at a meeting of the directors of said company held at Boston the following proceedings were had:

39 The following preamble and motion was then offered by Mr. P. R. Smith: "Whereas, the Second National Bank of New Mexico, holds the note of this company for the amount of $47,000 bearing interest at the rate of twelve per cent. per annum, and endorsed by P. R. Smith and C. H. Gildersleeve, which note was due April 30th, 1890. Now therefore, it is voted that the president and assistant treasurer are hereby authorized to execute in the name and behalf of the company this company's note payable to said Second National Bank of New Mexico, in sixty days from the date thereof, or in any other reasonable time, not exceeding ninety days, that said bank may agree to, for the amount of principal and interest due upon said outstanding note, said new note to bear interest at said rate of twelve per cent. per annum, and the said officers are hereby authorised to use said new note when endorsed by said Smith and Gildersleeve, or otherwise, in taking up or procurring an extension of this company's said outstanding note held by the said bank as aforesaid."

A vote being taken Messrs. Smith, Gildersleeve, Benton and Simpson voted in the affirmative, and Messrs. Richardson, True and Lakin voting in the negative. The motion was declared passed, the president refraining from voting.

No note was ever executed in accordance with the authority conferred by the foregoing vote of the directors, but the only note of the amount therein specified whichever was given was the note upon which plaintiff in the above-entitled cause has brought suit and which was made payable to P. R. Smith instead of the Second National Bank of New Mexico, as directed by the board of directors, but the said new note authorised by the said board was in-

40 tended merely for the purpose of taking up or procuring an extension of the former note for $47,000 and in no manner changed the nature of the transaction or character of the indebtedness.

Affiant further states upon information and belief that the only person having any real interest in said note was the plaintiff in the above-entitled cause and that neither the said Second National Bank of New Mexico, nor said P. R. Smith ever advanced any money thereon and as a part of the information upon this point submits the following copy of a letter from the president of said bank to the Comptroller of the Currency at Washington:

SECOND NATIONAL BANK OF NEW MEXICO,
SANTA FÉ, N. M., *November* 18, 1891.

To the honorable Comptroller of the Currency, Washington, D. C.

DEAR SIR: Replying to your favor of the 12th inst., regarding note of the Rio Grande Irrigation and Colonization Company for $50,760, I beg leave to inform you that you have been erroneously

informed regarding the Maverick national bank holding the same among its assets. Neither the note referred to, nor the collateral are deposited with the Maverick national bank—such note was endorsed over to us (but was not originally made payable to our order) in the regular course of business and as it was made payable at the Maverick national bank we forwarded it there for collection. It not having been paid on presentation, suit has been directed against the makers and proceedings instituted to sell the collateral to pay the note.

This note was made by the Rio Grande Irrigation and
41 Colonization Company to P. R. Smith and by him endorsed over to our bank with the collateral thereto attached, the proceeds of the note to be applied to the payment of land purchased for the use of the company, the deeds thereof having been deposited in escrow in this bank.

This bank has made no loan direct to the company and the endorsement of the note by this bank to I. W. Work, cashier of the Maverick national bank, about one year ago was for the purposes of collection only.

The note has not been rediscounted by this bank, neither has the bank in any manner loaned its credit to the company.

Very respectfully your obedient servant,

(Signed) L. SPIEGELBERG, *President.*

Affiant further states upon information and belief that the said company has never in any manner received the benefit of the collateral said to have been deposited with the said note, nor has the same been accounted for in any manner to the company or for its benefit.

Affiant further shows to the court that he is compelled to make this affidavit on behalf of said company for the reason that there is no officer of said company in New Mexico, and there is no way which it would be possible for affiant to send an affidavit to the State of Massachusetts, where those officers live, and have the same returned for use in support of his application to set aside the judgment heretofore rendered in said cause as the time within which it would be possible to sue out a writ of error for the review of said cause
42 would have expired before said affidavit could be sent and received back.

Affiant further states that the secretary and a stockholder in the said company have stated to him the facts constituting the defense in this action, and that affiant as counsel for said company has advised said secretary and stockholder after such statement that said defendant has a good and substantial defense upon the merits to the greater part of the cause of action upon which the said suit is brought.

Affiant further states that until about the last of October, 1894, for more than two years a large part of the stock of said company held by one James E. Martyn was by the order of this court enjoined from voting at any stockholders' meeting, as will appear by reference to case of Howard *et al. vs.* Martyn, numbered 3416, on the

docket of this court; that as soon as said injunction was dissolved a meeting of the stockholders was held and a new set of directors was elected; that the most if not all of the directors of said company prior to said election belonged to that portion of the stockholders hostile to the majority which afterwards obtained control, and that the director upon whom service of process was made in this cause was of that number; so that while service of process upon said director may have been compliance with the statute, yet as a matter of fact the stockholders whom this affiant represented in said injunction suit had no actual information, notice or knowl-
43 edge of the pendency of this action until this affiant communicated the fact to them some weeks after the judgment had been obtained and the persons who are now officers and directors of the company and charged with the management of its business had no such information, notice or knowledge of this action until informed of the same by this affiant as aforesaid in the month of October, 1894; and affiant although he made all possible efforts to do so, was unable to ascertain and inform himself as to the facts herein set up until on or about the first day of February, 1895, when he was in the city of Boston.

FRANK W. CLANCY.

Subscribed and sworn to before me this 7th day of September, A. D. 1895.

[SEAL.] HARRY F. LEE,
Notary Public.

In the District Court, Territory of New Mexico, County of Bernalillo.

CHARLES H. GILDERSLEEVE
vs.
RIO GRANDE IRRIGATION & COLONIZATION COMPANY.

Now comes the said defendant by its attorney, F. W. Clancy, and defends the wrong and injury when and where it shall behoove it and whatsoever else it ought to defend, and says that plaintiff ought not to have and maintain his aforesaid action against it, be-
44 cause it says that it did not undertake or promise in manner and form as plaintiff hath thereof complained against it and of this it puts itself upon the country.

F. W. CLANCY,
Attorney for Defendant.

And the plaintiff doth the like.

——— ———,
Attorney for Plaintiff.

And for a further plea in this behalf by leave of the court, first had and obtained, defendant says *actio non*, because it says that the promissory note referred to in said declaration a copy whereof is filed with said declaration, is not the genuine and duly executed note of this defendant and that this defendant never authorized or ratified the execution of the said note and that the persons whose

names are signed thereto were not authorized by this defendant to execute the said note in the name of the defendant nor has their action in executing said note ever been ratified by this defendant; and this defendant is ready to verify; wherefore it prays judgment of the action aforesaid of plaintiff and whether plaintiff ought to have or maintain his said action against it.

And for a further plea in this behalf, by leave of the court first had and obtained, defendant says *actio non*, because it says that the said promissory note referred to in said declaration, a copy of which is filed with said declaration was and is in truth and in fact
45 the promissory note of the said plaintiff, made and executed for his use and benefit, and in no manner for the use or benefit of this defendant; and if the said note had been duly authorized and executed by defendant, defendant would be only an accommodation maker for the use and benefit of plaintiff; and this defendant is ready to verify; wherefore it prays judgment of the action aforesaid of plaintiff and whether plaintiff ought to have and maintain his said action against it.

F. W. CLANCY,
Attorney for Defendant.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

F. W. Clancy being duly sworn on his oath says that he is the attorney and agent of the Rio Grande Irrigation and Colonization Company and that the foregoing pleas are true to the best of his knowledge, information and belief.

F. W. CLANCY.

Subscribed and sworn to before me on this 7th day of September, 1895.

HARRY F. LEE,
[NOTARY SEAL.] *Notary Public.*

And the said last-mentioned motion coming on to be heard before said court on the 12th day of September, 1895, and having been argued as well for plaintiff as for said defendant the court denied the same to which action of the court in denying said motion,
46 and refusing to vacate and set aside the judgment aforesaid, the defendant then and there duly excepted and still doth except.

And prays that this bill of exceptions containing the foregoing matters may be signed, sealed and made a part of the record of said case, which is accordingly done this 3rd day of December, 1895.

N. C. COLLIER, *Judge.*

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Second Judicial District Court.

I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county

of Bernalillo, do hereby certify that the above and foregoing is a true, correct and complete transcript and copy of the records and proceedings had in cause lately pending in the said district court for the county of Bernalillo, wherein Charles H. Gildersleeve was the plaintiff and The Rio Grande Irrigation and Colonization Company was the defendant, as the same appears of record and from the files in my said office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said district court this 24th day of April, 1896.

[SEAL.] O. N. MARRON, *Clerk.*

47 And afterwards, to wit, on the 23rd day of July, A. D. 1896, there was filed in the office of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors is in the words and figures following, to wit:

In the Supreme Court, Territory of New Mexico, July Term, 1896.

RIO GRANDE IRRIGATION AND COLONIZATION COMPANY
vs.
CHARLES H. GILDERSLEEVE.

Now comes the said plaintiff in error, by its attorney, and says that there is manifest error in the record and judgment of this cause, and assigns the following as grounds of error in said record and judgment:

1. The final judgment entered against defendant below was not preceded by any proper interlocutory judgment or by the entry of any default.

48 2. Such interlocutory judgment as was entered was not based upon any default by defendant below, ascertained or declared by the court.

3. Such interlocutory judgment was based upon a certificate by the clerk of the court that no appearance of defendant was entered in his office.

4. The defendant below was never called and defaulted as required by law.

5. Judgment was rendered after defendant below had regularly appeared in the cause.

6. No copy of the declaration was ever served upon defendant below as required by law.

7. The defendant below was in no way in default when judgment was rendered.

49 8. The court erred in denying the first motion of defendant below to set aside the judgment for irregularities.

9. The court erred in denying the second motion of defendant below to set aside judgment for reasons set forth in accompanying affidavit.

Wherefore the said plaintiff in error prays this honorable court that the judgment of the court below may be reserved, vacated, set aside, and altogether held for nothing, and that judgment may be

entered herein as to this court shall seem proper and according to law.

F. W. CLANCY,
Attorney for Plaintiff in Error.

50 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held on July 27th, 1896, at Santa Fé, New Mexico, the seat of government of said Territory, and on the 5th day of August, A. D. 1896, the same being the ninth day of said term, the following, among other, proceedings were had, to wit:

RIO GRANDE IRRIGATION AND COLONIZATION Company, Pl'ff in Error, *vs.* CHARLES H. GILDERSLEEVE.	643. Error to Bernalillo Co.

It is ordered by the court that this cause be, and the same hereby is, set down for hearing upon Tuesday, August 11th, 1896.

And afterwards, to wit, on the 1st day of February, A. D. 1897, the same being Monday, February 1st, 1897, and the forty-sixth day of the said regular term of said supreme court of the Terri-
51 tory of New Mexico, the following, among other, proceedings were had, to wit:

RIO GRANDE IRRIGATION AND COLONIZATION Company, Pl'ff in Error, *vs.* CHARLES H. GILDERSLEEVE.	643. Error to Bernalillo Co.

By consent of the said parties, by their respective attorneys, this cause is now submitted to the court, without oral argument, upon the transcript of record, assignment of errors, and briefs of counsel on file, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on the forty-seventh day of said regular term of said supreme court, the same being Monday, March 1st, A. D. 1897, the following, among other, proceedings were had, to wit:

52 THE RIO GRANDE IRRIGATION AND COLONIZATION Company, P'ff in Error, *vs.* CHARLES H. GILDERSLEEVE, Def't in Error.	643. Error to District Court of Bernalillo County.

This cause having been submitted on briefs and taken under advisement by the court on a former day of the present term of this court, and the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Bantz, Chief Justice Smith and Associate Justice Laughlin concurring, affirm-

ing the judgment of the lower court for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that judgment herein of the district court of the county of Bernalillo, whence this cause came into this court,
53 be, and the same hereby is, affirmed, and that in accordance therewith the said defendant in error, Charles H. Gildersleeve, do have and recover of the said plaintiff in error, The Rio Grande Irrigation and Colonization Company, the sum of seventy-six thousand three hundred and ninety-three dollars and eighty cents, with interest thereon from the 10th day of September, A. D. 1894, at the rate of twelve per centum per annum, together with costs thereon, both in the court below as well as in this court, in this behalf expended, to be taxed, for which let execution issue.

And afterwards, to wit, on the said 1st day of March, A. D. 1897, there was filed in the office of the clerk of the said supreme
54 court of the Territory of New Mexico an opinion; which said opinion is in the words and figures following, to wit:

Opinion.

THE RIO GRANDE IRRIGATION AND COLONIZATION COMPANY, P'ff in Error,
vs.
CHARLES H. GILDERSLEEVE, Def't in Error. } 643.

The defendant below was only served with process, and on the 3rd day of August, 1894, entered its appearance by attorney. On the 15th of September the attorney, in writing, withdrew appearance of the defendant, and on the same day judgment was taken for failure to appear. On October 5th execution was issued, and on October 26th return was made of *nulla bona*.

On November 15th defendant filed its motion to vacate
55 the judgment. This motion was not argued and submitted until September 6th of the following year (1895), when it was overruled. Three days afterwards another motion to vacate was filed with an affidavit of merit. This motion was likewise overruled and the cause is brought here on writ of error.

Section 4, chapter 66, Acts of 1891, entitles the plaintiff to a judgment if the defendant fails to appear, and it may be rendered at any place in the district. There was no occasion for the judgment to recite that the defendant had been called. The absence of an order granting leave to withdraw the appearance of the defendant was not a matter of which defendant could complain. The court in granting the judgment ratified the act of withdrawal.

It is not pretended that any collusion was practiced be-
56 tween the plaintiff and the defendant's attorney, nor that the attorney, either in entering or withdrawing defendant's appearance, acted without authority or by mistake. It is urged that the withdrawal has not been preserved properly in the record brought to this court, and our attention is called to its recital in the

record proper where it is claimed to have been improperly copied by the clerk in preparing the transcript; but the written withdrawal was also preserved by the bill of exceptions (page 25, printed Record).

The affidavit of merit does not charge that the resolutions of the board of directors of defendant company authorizing and afterwards recognizing the creation of the debt were fraudulently or
57 collusively procured, but it is charged that the corporation received no benefit from the note, which was really for the benefit of the endorser now suing upon it. An affidavit of merit would not alone be sufficient to entitle a defaulting party to have a judgment against it set aside and much less entitle it to a reversal of the district court for refusing to set the judgment aside.

Trial courts have a liberal discretion over such matters, which an appellate court has not.

This judgment was rendered September 15th, 1894, yet the affidavit of merit was not filed till September 9th, 1895, after a motion to vacate the judgment had been overruled. The affidavit of merit filed in support of the second motion to vacate sets out that
58 affiant had been employed as attorney by certain of the stockholders of defendant company in another suit and communicated to them the fact of this judgment "some weeks after the judgment had been obtained," "in the month of October, 1894," and that he was employed as attorney for the company on the 7th of November, 1894. Rule 29 provides that no motion to set aside judgments rendered in vacation shall be entertained unless filed and a copy thereof served on the opposite party within ten days after the entry of such judgment. It will not be necessary to determine whether the court below could have set aside the judgment on an application filed after the ten days had expired, if a diligent effort and a
59 showing of merit had been made, but there was such an apparent lack of diligence in this case that we think the trial court properly refused to set the judgment aside. There is no error in the record and the judgment must be affirmed.

GIDEON D. BANTZ,
Associate Justice.

We concur.
THOMAS SMITH, *C. J.*
N. B. LAUGHLIN, *A. J.*

60 And afterwards, to wit, on the said 1st day of March, A. D. 1897, in the said supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

RIO GRANDE IRRIGATION AND COLONIZATION Company, P'ff in Error,
vs.
CHARLES H. GILDERSLEEVE, Def't in Error.
} Error to District Court of Bernalillo County.

It is ordered by the court that the plaintiff in error in this cause be and it is allowed twenty days in which to file a motion for rehearing herein.

61 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the twenty-sixth day of July, A. D. 1897, and on the thirty-fifth day of said regular term of said supreme court, the same being Monday, January 10th, 1898, the following, among other, proceedings were had, to wit:

RIO GRANDE IRRIGATION AND COLONIZATION Company, P'ff in Error,
vs.
CHARLES H. GILDERSLEEVE, Def't in Error.
} 643. Error to District Court of Bernalillo County.

Now comes the said plaintiff in error, by its attorney, and here in open court prays the court to grant it an appeal from the judgment of this court heretofore rendered in this cause to the Supreme Court of the United States.

62 And it appearing to the court that said plaintiff in error is by law entitled to such appeal as a matter of right, it is ordered by the court that said plaintiff in error be, and it hereby is, granted an appeal from the judgment of this court heretofore rendered in this cause to the Supreme Court of the United States.

And afterwards, to wit, on the 11th day of January, A. D. 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a statement of facts; which statement of facts is in the words and figures following, to wit:

63 In the Supreme Court of the Territory of New Mexico, at the July Term, 1897.

RIO GRANDE IRRIGATION AND COLONIZATION COMPANY
vs.
CHARLES H. GILDERSLEEVE.
} 643.

The plaintiff in error having applied to the court for a statement of facts in this case in accordance with the provisions of the act of Congress entitled "An act concerning the practice in territorial courts and appeals therefrom," which became a law on the 7th of April, 1874, the court now makes and certifies the following statement of facts:

1. On the 17th day of July, 1894, the said Gildersleeve filed in the office of the clerk of the district court for the county of Bernalillo, in the Territory of New Mexico, a declaration in as-

64 sumpsit, which contained a special count upon a promissory note; which promissory note was as follows:

Second national bank.

$50,760. SANTA FÉ, N. M., *June* 30, 1890.

Sixty days after date we, jointly and severally, promise to pay to the order of P. R. Smith fifty thousand seven hundred and sixty

dollars, with interest after date, at the rate of twelve per cent. per annum, until paid, and reasonable costs of collection, including plaintiff's attorneys' fees, if not paid when due; value received.

Payable at Maverick national bank, Boston.

RIO GRANDE IRRIGATION AND COLONIZATION COMPANY,
By HORACE D. HALL, *President.*

Countersigned:
RIO GRANDE IRRIGATION & COLONIZATION COMPANY,
By A. L. RICHARDSON, *Assistant Treasurer.*

[Seal of the Company.]

65 Endorsed: Pay to the order of the Second National Bank of New Mexico, at Santa Fé. P. R. Smith. C. H. Gildersleeve. Pay to the order of J. H. Work, Cr., for collection on account of Second National Bank of New Mexico, at Santa Fé. W. G. Simmons, cashier. W. G. Simmons.

The said special court declared on said note as having been endorsed by P. R. Smith to the said Charles H. Gildersleeve.

2. There was filed with the said declaration a copy of the record of certain proceedings of the directors of the plaintiff in error; which copy was as follows, to wit:

Office of A. L. Richardson, sec'y of the Rio Grande Irrigation & Colonization Company, No. 1 Beacon St., room 81.

BOSTON, *June* 30, 1890.

At a meeting of the directors of the Rio Grande Irrigation & Colonization Company held at the office of the secretary on
66 June 10, 1890, the following preamble and resolution was passed:

"Whereas the Second National Bank of New Mexico (Santa Fé) holds the note of this company for the amount of forty-seven thousand ($47,000) dollars, bearing interest at the rate of twelve per cent. per annum and endorsed by P. R. Smith and C. H. Gildersleeve, which note was due April 30, 1890:

Now, therefore, it is voted—

That the president and assistant treasurer are hereby authorized to execute in the name and behalf of the company this company's note, payable to said Second National Bank of New Mexico in sixty days from the date thereof or in any other reasonable time not exceeding ninety days that said bank may agree to for the amount of principal and interest due on said outstanding note, said new note to bear interest at said rate of twelve per cent. per annum, and the said officers are hereby authorized to use such new note when
67 endorsed by said Smith and Gildersleeve or otherwise in taking up or procuring an extension of this company's outstanding note held by the said bank, as aforesaid.

A true copy.

[Seal of the Company.]

Attest: A. L. RICHARDSON, *Secretary.*

3. Summons was issued from the said district court immediately on the filing of said declaration, and was served by delivering a copy thereof to J. Francisco Chavez, a director and stockholder of the company, on the same day.

4. On the 3rd day of August, 1894, the appearance of the company was entered in writing in the said district court by H. L. Pickett, its attorney.

5. On the 15th day of September, 1894, there was filed in the office of the clerk of said district court the following letter:

H. L. Pickett, attorney-at-law.

SILVER CITY, NEW MEXICO, *Sept. 7th*, 1894.

Messrs. Warren & Fergusson, attorneys-at-law, Albuquerque, N. M.

68 GENTLEMEN: Some time since I filed an appearance in the case of Gildersleeve *vs.* some Co.—I don't now remember the exact name—of which Col. P. R. Smith is the agent, and at his request I withdraw the appearance. You can show this letter to the clerk of the court and have the appearance withdrawn and take your judgment.

Yours truly, H. L. PICKETT.

6. On the 15th day of September, 1894, the clerk of said district court filed a certificate in his office, setting forth that the declaration aforesaid had been filed, as hereinbefore stated, and that process was issued and served, as hereinbefore stated, and, further, that no appearance of the defendant was entered in his office.

7. On the same day a judgment by default was entered against the said company for non-appearance and final judgment
69 was entered for seventy-six thousand three hundred and ninety-three dollars and eighty cents and costs, the judgment to bear interest at the rate of twelve per cent. per annum, as being the rate expressed in the promissory note on which the action was based.

8. After the appearance of said company had been duly and regularly entered by said Pickett, as hereinbefore stated, no application was ever made to the said district court or to the judge thereof for leave to withdraw said appearance, and no order was ever made by said court or said judge giving leave that such appearance might be withdrawn, except as hereinbefore may appear, if anything does so appear.

9. On the 15th day of November, 1894, and during the next succeeding term of said district court, after said judgment had been entered in vacation, the said company filed in the office of the clerk of said district court its motion to vacate and set aside the said judgment for the following reasons:

70 1.

Said judgment was taken against this defendant for want of an appearance, when the record shows that it had duly and regularly entered its appearance.

2.

No copy of the declaration was ever served upon the defendant, notwithstanding the fact that its appearance had been regularly entered.

3.

This defendant was in no way or manner in default at the time said judgment was entered, as will appear by inspection of the record.

10. The said motion to set aside said judgment was denied by the court on the 6th of September, 1895, and an exception duly taken by the company to the action of the court.

11. On the 9th day of September, 1895, the said company filed in the office of the clerk of said district court its motion to vacate and set aside said judgment for reasons set forth in an ac-
71 companying affidavit of Frank W. Clancy, and also filed its proposed pleas, duly verified. From the said affidavit it appeared that the affiant was the regular attorney for such company and had been ever since the 7th day of November, 1894, and that as such attorney he had informed himself as to the matter in litigation in said cause and proceeded to set forth the facts. Those facts so set forth were, briefly, as follows:

That the directors of said company, at Boston, on the 9th of July, 1889, authorized the said Gildersleeve to purchase certain specified properties in the Territory of New Mexico, and, in order to enable him to do so, voted to him fifty thousand shares of the capital stock of the company and the sum of $1,510,000 in the first-mortgage bonds of the company. This proceeding of the company was set forth in a verbatim copy from the record of the directors
72 and appears in the transcript of the record in this cause.

On the 31st of October, 1889, the said Gildersleeve reported to a meeting of stockholders of the company at Santa Fé, New Mexico, at which meeting 3,772 shares of stock were represented, of which 2,500 were held by said Gildersleeve himself, and by his report set out his various proceedings under the authority theretofore given him and requested that his acts be ratified by the stockholders, and that all the bonds and stock so voted to him, excepting what might be returned by him as a fund created for the purchase of the Espiritu Santo grant, which he had not himself been able to purchase, be declared to be his property and fully paid for by him. It was thereupon voted by the said stockholders' meeting that the report aforesaid be ratified and approved, and was accepted in full
73 discharge and satisfaction of the contracts between the said company and said Gildersleeve, and his acts were declared to be a full and complete performance by him of the resolutions of the directors theretofore passed, and all the bonds and stock of the company theretofore voted and delivered to him, excepting $150,000 of bonds and 750 shares of stock for the purchase of the Ojo del Espiritu Santo grant, were declared to belong to him. The said report and vote of the said stockholders were set forth in full in

said affidavit and appear in full in the transcript of the record in this cause.

At the said meeting of stockholders other proceedings were also had, of which the following is a copy:

"Whereas, owing to the failure of some of the directors of this company and subscribers for stock and bonds heretofore voted Charles H. Gildersleeve to pay the cash therefor in order to
74 enable him to pay for the Vallecito grant, and it being the desire of the stockholders that the title thereto shall immediately vest in S. Endicott Peabody, trustee, to carry out the objects of the company and give greater value and security for its bonds, and said Gildersleeve proposes, *that* in consideration of the assistance of this company to enable him to raise the sum of forty-seven thousand dollars to make final payment therefor, to deposit as security therefor the sum of one hundred and twenty thousand dollars of the bonds of the company and six hundred shares of the capital stock of the company, it is voted that P. R. Smith, president of this stockholders' meeting, sign and execute, in the name of the company, a promissory note for the sum of forty-seven thousand dollars, payable in six months, to pay for the balance due on said grant, and that unless paid at maturity by the sale of bonds deposited as collateral thereto the treasurer of this company is hereby directed to pay the same out of the treasury."

75 After a recess the said Smith reported to the said stockholders' meeting that he had signed the company's name to a note in favor of the Second National Bank of Santa Fé for forty-seven thousand dollars, payable in six months, bearing twelve per cent. interest from date, and that there had been deposited as collateral thereto one hundred and twenty thousand dollars in bonds and six hundred shares of stock. It was also set forth in said affidavit that the said note for $47,000 was in fact the note of said Gildersleeve, and that said company, as between it and said Gildersleeve, was a mere surety on said note, which, if it represented anything, evidenced his indebtedness only; that no portion of the bonds and stock voted to Gildersleeve on the 9th of July, 1889, with the exception hereinbefore stated, was ever returned to or received by the company.

76 On the 10th day of June, 1890, at a meeting of the directors of said company at Boston the following proceedings were had:

The following preamble and motion was then offered by Mr. P. R. Smith:

"Whereas the Second National Bank of New Mexico holds the note of this company for the amount of $47,000, bearing interest at the rate of 12 per cent. per annum, and endorsed by P. R. Smith and C. H. Gildersleeve, which note was due April 30th, 1890:

Now, therefore, it is voted that the president and assistant treasurer are hereby authorized to execute in the name and behalf of the company this company's note, payable to said Second National Bank of New Mexico, in sixty days from the date thereof or in any other reasonable time not exceeding ninety days that said bank

may agree to for the amount of principal and interest due
77 upon said outstanding note, said new note to bear interest at said rate of 12 per cent. per annum, and the said officers are hereby authorized to use said new note when endorsed by said Smith and Gildersleeve or otherwise in taking up or procuring an extension of this company's said outstanding note held by the said bank, as aforesaid."

A vote being taken, Messrs. Smith, Gildersleeve, Benton, and Simpson voted in the affirmative, and Messrs. Richardson, True, and Lakin voting in the negative. The motion was declared passed, the president refraining from voting.

The said affidavit also set out that no note was executed in accordance with the authority conferred by the foregoing vote of the directors, but that the only note of the amount therein specified ever given was the note upon which Gildersleeve brought suit and which was made payable to P. R. Smith instead of to the
78 bank, as directed by the directors, but the said new note authorized by the board was merely for the purpose of taking up the former note for $47,000.

The said affidavit also set out upon information and belief that the only person having any real interest in said note was the said Gildersleeve, and that neither the bank nor said Smith ever advanced any money thereon, and as a part of such information set out a copy of a letter from the president of the bank to the Comptroller of the Currency, at Washington, in which it was declared that the note had been by Smith endorsed to the bank, with the collateral thereto attached, the proceeds of the note to be applied to the payment of land purchased for the use of the company, the deeds thereof having been deposited in escrow in the bank; that the bank had made no loan direct to the company, and that the note
79 had not been rediscounted by the bank, nor had the bank in any manner loaned its credit to the company.

The said affidavit also set out that the company had never in any manner received the benefit of the collateral said to have been deposited with the said note, nor had the same been accounted for in any manner to the company or for its benefit.

The said affiant further stated that the secretary and a stockholder in the said company had stated to him the facts constituting the defense to the action, and that affiant, as counsel for said company, had advised said secretary and stockholder after such statement that the company had a good and substantial defense upon the merits to the greater part of the cause of action upon which the suit was brought.

80 Affiant further stated that until about the last of October, 1894, for more than two years, a large part of the stock of said company, held by one James E. Martyn, was by the order of said district court enjoined from voting at any stockholders' meeting, as would appear by reference to the case of Howard *et al. vs.* Martyn, numbered 3416 on the docket of said court; that as soon as said injunction was dissolved a meeting of the stockholders was held and a new set of directors was elected; that the most, if not all, of

the directors of said company prior to said election belonged to that portion of the stockholders hostile to the majority which afterwards obtained control, and that the director upon whom service of process was made, as hereinbefore stated, was of that number, so that, while service of process upon said director may have been a com-
81 pliance with the statute, yet as a matter of fact the stockholders whom affiant had represented in said injunction suit had no actual information, notice, or knowledge of the pendency of said action until affiant communicated the fact to them some weeks after the judgment had been obtained, and the persons who were then officers and directors of the company and charged with the management of its business had no such information, notice, or knowledge of said action until some time in the month of October, 1894, and that affiant was unable to ascertain and inform himself as to the facts set up in this affidavit until about the first day of February, 1895, when he was in the city of Boston.

12. No counter-affidavit or other showing of facts in opposition to the affidavit aforesaid was made by or for said Gildersleeve.

82 13. The said last-mentioned motion was heard before the district court on the 12th day of September, 1895, and was denied, and defendant duly excepted to the action of the court in denying said motion.

The supreme court of New Mexico hereby certifies that the foregoing statement sets forth the facts of the case therein referred to, and that this statement and certificate are made for the purpose of complying with the provisions of the act of Congress of April 7, 1874, hereinbefore cited and referred to, and are based entirely upon what appears in the transcript with which they are to be transmitted to the Supreme Court of the United States.

THOMAS SMITH,
Chief Justice of the Supreme Court of New Mexico,
Who Signs this Certificate on Behalf of the Court.

83 And afterwards, to wit, on the said 10th day of January, A. D. 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a citation; which said citation is in the words and figures following, to wit:

The United States of America to Charles H. Gildersleeve, Greeting:

You are hereby cited and admonished to be and appear before our Supreme Court, at the city of Washington, in the District of Columbia, on or before the eleventh day of March, A. D. 1898, then and there to answer the appeal of Rio Grande Irrigation and Colonization Company taken from the judgment of the supreme court of New Mexico rendered in your favor in a certain cause lately
84 pending in said last-mentioned court, wherein said Rio Grande Irrigation and Colonization Company was plaintiff in error and you were defendant in error, and to show cause, if any there be, why the said judgment should not be reversed, vacated, and set aside and speedy justice thereupon done between the parties.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

THOMAS SMITH,
Chief Justice of the Supreme Court of New Mexico.

On behalf of Charles H. Gildersleeve I hereby acknowledge service of above citation this 10th day of January, 1898.

H. L. WARREN,
Att'y for said C. H. Gildersleeve.

85 TERRITORY OF NEW MEXICO:

Supreme Court.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the transcript and all the papers on file, *and* together with all record entries in said court, in the case lately pending therein entitled Rio Grande Irrigation and Colonization Company, plaintiff in error, *vs.* Charles H. Gildersleeve, defendant in error, as the same appears on file and remains of record in my office.

86 Witness my hand and the seal of said supreme court of the Territory of New Mexico this 11th day of February, A. D. 1898.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS,
Clerk of the Supreme Court of New Mexico.

87 In the Supreme Court of the United States.

RIO GRANDE IRRIGATION AND COLONIZATION COMPANY, Appellant,
vs.
CHARLES H. GILDERSLEEVE, Appellee.

Now comes the said appellant, by its attorney, and says that there is manifest error in the record and judgment of this case, and assigns the following as errors in said record and judgment:

1st. The final judgment entered against defendant below in the district court for Bernalillo county was not preceded by any proper interlocutory judgment or by the entry of any default.

2nd. Such interlocutory judgment as was entered in said district court was not based upon any default by the defendant below ascertained or declared by the court.

3rd. Such interlocutory judgment was based upon a certificate by the clerk of said district court that no appearance of defendant was entered in his office.

4th. The defendant below was never called and defaulted in said district court as required by law.

5th. Judgment was rendered in said district court after the defendant below had regularly appeared in the cause.

6th. No copy of the declaration was ever served on the defendant below as required by law before default could properly be entered against it.

7th. Defendant below was in no way in default when judgment was rendered in said district court.

88 8th. The district court erred in denying the first motion of the defendant below to set aside the judgment for irregularities.

9th. The district court erred in denying the second motion of the defendant below to set aside the judgment for reasons set forth in accompanying affidavit.

10th. The supreme court of the Territory of New Mexico erred in affirming the judgment of the district court.

Wherefore the said appellant prays this honorable court that the judgment of the court below may be reversed, vacated, set aside, and altogether held for nothing, and that judgment may be entered herein as to this court may seem proper and according to law.

F. W. CLANCY,
Attorney for Appellant.

89 [Endorsed:] In the Supreme Court of the United States. Rio Grande Irrigation & Colonization Company, appellant, *vs.* Charles H. Gildersleeve, appellee. Appeal from New Mexico. Assignment of errors.

90 [Endorsed:] Case No. 16,813. Supreme Court U. S., October term, 1897. Term No., 600. The Rio Grande Irrigation & Colonization Co., app't, *vs.* Chas. H. Gildersleeve. Assignment of errors. Office Supreme Court U. S. Filed Mar. 7, 1898. James H. McKenney, clerk.

91 The United States of America to Charles H. Gildersleeve, Greeting:

You are hereby cited and admonished to be and appear before our Supreme Court, at the city of Washington, in the District of Columbia, on or before the eleventh day of March, A. D. 1898, there and then to answer the appeal of Rio Grande Irrigation and Colonization Company taken from the judgment of the supreme court of New Mexico, rendered in your favor in a certain cause lately pending in said last-mentioned court, wherein said Rio Grande Irrigation and Colonization Company was plaintiff in error and you were defendant in error, and to show cause, if any there be, why the said judgment should not be reversed, vacated, and set aside and speedy justice thereupon done between the parties.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

THOMAS SMITH,
Chief Justice of the Supreme Court of New Mexico.

On behalf of Charles H. Gildersleeve I hereby acknowledge service of above citetion this 10th day of January, 1898.

H. L. WARREN,
Att'y for said C. H. Gildersleeve.

92 [Endorsed:] No. 643. Supreme court, Territory of New Mexico. Rio Grande Irrigation and Colonization Co. *vs.* Chas. H. Gildersleeve. Citation. Filed in my office this 10th day of January, A. D. 1898. Geo. L. Wyllys, clerk.

93 [Endorsed:] Case No. 16,813. Supreme Court U. S., October term, 189–. Term No., 600. The Rio Grande Irrigation & Colonization Co., app't, *vs.* Chas. H. Gildersleeve. Citation & proof of service. Office Supreme Court U. S. Filed Mar 7, 1898. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,813. New Mexico Territory supreme court. Term No., 254. The Rio Grande Irrigation & Colonization Company, appellant, *vs.* Charles H. Gildersleeve. Filed March 7th, 1898.